

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JULIE MCEWEN,

Plaintiff,

v.

ACCELERATED COMMERCIAL
CONSULTANTS, FRANK ULBRIGHT,
TERRY PRITCHETT, and MARK
MASTRANGELO,

Defendants.

2:09-CV-02173-PMP-LRL

ORDER

Presently before the Court is Defendant Mark Mastrangelo's Motion for Summary Judgment (Doc. #88), filed on September 27, 2010. Plaintiff Julie McEwen filed an Opposition (Doc. #98) on October 25, 2010. Defendant Mark Mastrangelo filed a Reply (Doc. #110) on November 12, 2010. The Court held a hearing on this motion on February 1, 2011.

I. BACKGROUND

Defendant Terry Pritchett ("Pritchett") was the President of Defendant Accelerated Commercial Consultants ("ACC"). (Def.'s MSJ, Ex. B.) ACC was formed on April 3, 2008. (Def.'s MSJ, Exs. B, C.) Defendant Frank Ulbright ("Ulbright") was ACC's Secretary and a director. (Def.'s MSJ, Exs. B, C.) After ACC was formed, Defendant Mark Mastrangelo ("Mastrangelo") acted as an unpaid advisor to ACC. (Def.'s MSJ, Exs. B, C, E.) In September 2008, Mastrangelo was given authority to withdraw funds from the ACC bank account. (Pl.'s Opp'n, Ex. 4.) A corporate banking resolution signed by

1 Pritchett, Ulbright, and Mastrangelo states that the following “named officer or employees
2 of this Corporation” shall have signature authority on the account, and Mastrangelo is listed
3 as one of these individuals. (Id.) Mastrangelo officially became ACC’s Treasurer in June
4 2009. (Def.’s MSJ, Exs. B, C.)

5 While Mastrangelo was an unpaid advisor, Pritchett and Ulbright asked
6 Mastrangelo to evaluate an investment opportunity known as the Tomco Project. (Def.’s
7 MSJ, Exs. B, C.) Tomco is a concrete company which developed a machine that would
8 facilitate the clean and safe disposal of slurry. (Pl.’s Opp’n, Ex. 6.) Plaintiff Julie
9 McEwen’s (“McEwen”) boyfriend at the time, Chris Carriera (“Carriera”), was a Tomco
10 employee. (Id.) Mastrangelo initially expressed the project had potential because it was a
11 green project and concrete businesses needed a means to dispose of slurry. (Def.’s MSJ,
12 Exs. B, C.) Additionally, ACC was reviewing other projects that involved substantial use
13 of concrete, and the Tomco Project thus would have provided a good fit with ACC’s other
14 planned investments. (Def.’s MSJ, Ex. C.) Carriera contends Ulbright, Pritchett, and
15 Mastrangelo promised him \$500,000 for each investor he introduced to ACC who invested
16 with ACC. (Pl.’s Opp’n, Ex. 1.)

17 Plaintiff McEwen was Pritchett’s neighbor. (Def.’s MSJ, Exs. B, D at 9-10.)
18 Pritchett would hold social gatherings in his garage, to which McEwen was invited. (Def.’s
19 MSJ, Exs. B, C, D.) McEwen met Mastrangelo at one of these gatherings in the summer of
20 2008. (Def.’s MSJ, Ex. D at 9-10.) According to McEwen, Pritchett introduced
21 Mastrangelo as his partner. (Def.’s MSJ, Ex. D at 10.) According to McEwen, Pritchett,
22 Ulbright, and Mastrangelo told her she would become rich by investing with ACC. (Pl.’s
23 Opp’n, Ex. 6.)

24 Pritchett told McEwen that ACC was going to fund the Tomco Project. (Def.’s
25 MSJ, Ex. D at 17.) McEwen was going to invest money with ACC that would be used to
26 purchase a \$100 million bank guarantee that in turn would be used to fund the Tomco

1 Project. (Def.'s MSJ, Ex. D at 17.) According to McEwen, the entire \$100 million was to
2 be used for the Tomco Project, as represented to her by Pritchett, Ulbright, and
3 Mastrangelo. (Def.'s MSJ, Ex. 17.) According to McEwen, these representations were
4 made to her prior to her investing the funds with ACC. (Def.'s MSJ, Ex. D at 17-18.)

5 According to Pritchett and Ulbright, Mastrangelo did not solicit contributions for
6 ACC and "had no involvement in . . . McEwen's decision to place her money with ACC to
7 fund the Tomco projects." (Def.'s MSJ, Exs. B, C.) Pritchett and Ulbright contend they
8 never heard Mastrangelo say anything to Plaintiff suggesting she should invest with ACC.
9 (Def.'s MSJ, Exs. B, C.) McEwen testified at her deposition that the only comment she
10 could remember Mastrangelo making to her before she invested her money was that they
11 were all going to be rich because the money she invested would produce a \$100 million
12 bank guarantee. (Def.'s MSJ, Ex. D at 14-15.) However, McEwen could not recall any
13 specific representations Mastrangelo made to her regarding the project prior to the time she
14 invested her money. (Def.'s MSJ, Ex. D at 74.) Mastrangelo denies that he ever told
15 Plaintiff that those who funded ACC's efforts to obtain the bank guarantees were going to
16 be rich, or that he made promises to her or offered an opinion regarding her investing funds
17 with ACC. (Def.'s MSJ, Ex. E.)

18 On October 14, 2008, McEwen entered into a contract with ACC pursuant to
19 which she deposited \$450,000 with ACC. (Def.'s MSJ, Ex. A.) In return, ACC agreed to
20 pay McEwen \$1.25 million within 90 days of the funding of the Tomco Project. (Id.) The
21 contract is signed by McEwen, Ulbright, and Pritchett. (Id.) Plaintiff wired the money to
22 ACC's trust account that same day. (Def.'s MSJ, Exs. B, C.)

23 On October 21, 2008, ACC wired \$650,000, which included McEwen's funds, to
24 the law firm Murphy & Vickers in Texas, as part of a joint venture arrangement with a
25 company called Republic Interests, LCC ("Republic"). (Def.'s MSJ, Exs. B, C, F; Pl.'s
26 Opp'n, Ex. 10.) According to Pritchett and Ulbright, this was done because the law firm

1 was going to assist ACC with obtaining a bank guarantee to fund the Tomco Project and
2 other projects. (Def.'s MSJ, Exs. B, C.) Murphy & Vickers then wired the money to an
3 attorney named Ron Arneson ("Arneson"), who represented William Hurst ("Hurst"), a
4 broker, on November 7, 2008. (Def.'s MSJ, Exs. B, C; Pl.'s Opp'n, Ex. 11.) Arneson was
5 to hold the funds in escrow pending provision of a bank guarantee by Halbau Project
6 Development, Inc. ("Halbau"). (Pl.'s Opp'n, Ex. 12.)

7 On November 10, Patrick Murphy ("Murphy") of Republic contacted Arneson
8 who informed Murphy that Arneson had wired the funds out without receiving confirmation
9 of the bank guarantee. (Pl.'s Opp'n, Ex. 13.) Republic issued a demand letter to Arneson
10 that same day, advising him he had violated the escrow agreement, and to return the funds
11 within twenty-four hours. (Id.; Pl.'s Opp'n, Ex. 15.) Murphy sent a followup email to
12 Arneson on November 12, which Murphy forwarded to Ulbright. (Pl.'s Opp'n, Exs. 13,
13 16.) Ulbright responded to that email, thanking Murphy and requesting Murphy keep him
14 advised of the situation. (Pl.'s Opp'n, Ex. 16.) That same day, Murphy spoke with Ulbright
15 who informed him that ACC would handle the problem because they had worked with
16 Hurst and Arneson before and could resolve the matter. (Pl.'s Opp'n, Ex. 13.)

17 On November 20, ACC and Halbau entered into a profit sharing agreement
18 regarding a 100 million euro bank guarantee from Banco Santander. (Pl.'s Opp'n, Ex. 17.)
19 The agreement was signed by Ulbright and Hurst. (Id.) The agreement states that "[a]s
20 owner of \$700,000 that was deposited by wire to Ron Arneson's IOLTA bank account . . .
21 Accelerated Commercial Consultants is aware that Ron Arneson has bank wired the
22 \$700,000 to Sagrado Oro, LLC, Las Vegas, Nevada, who bank wired the \$700,000 to
23 Banco Santander, Bogota, Colombia, to cover the cost of bank verification and
24 authentication by MT 760 on Euroclear Screen of the \$100,000,000.00 BG [bank
25 guarantee] by the to be named platform receiving bank." (Id.)

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1 There is no documentary evidence in the record demonstrating where Arneson
2 actually wired the funds. However, according to an affidavit signed by Ulbright in March
3 2010, “[i]n 2008, funds belonging to ACC in the amount of \$700,000 were transferred to
4 . . . Mary Carillo and her company, . . . Sagrado Oro.” (Pl.’s Opp’n, Ex. 38.) Ulbright went
5 on to aver that although Mary Carillo (“Carillo”) and Sagrado Oro received ACC’s funds,
6 they never provided the promised bank guarantee. (Id.) Ulbright further averred that
7 Carillo transferred \$250,000 of those funds to Hurst in 2008. (Id.) Pritchett likewise avers
8 that after the money was transferred, he learned that a dispute had arisen between Hurst and
9 Carillo, and the money never was sent to the bank to obtain a guarantee. (Def.’s MSJ, Ex.
10 B.)

11 In an April 2010 affidavit, Ulbright stated that Murphy & Vickers transferred the
12 \$700,000 to Carillo. (Pl.’s Opp’n, Ex. 39.) However, the documentary evidence shows that
13 Murphy & Vickers sent the money to Arneson and that Ulbright knew it, as set forth in the
14 email from Murphy to Ulbright and the November 20, 2008 agreement between ACC and
15 Halbau, which Ulbright signed. In the April 2010 affidavit, Ulbright again averred that
16 Carillo never obtained the bank guarantee and instead transferred \$250,000 to Hurst. (Id.)
17 There is no documentary evidence in the record showing Carillo ever received the funds or
18 transferred any funds to Hurst. There is no evidence in the record of any agreement
19 between Carillo and/or Sagrado Oro and any other entity. Ulbright stated that Carillo’s
20 actions “caused performance of the Placement Agreement [with McEwen] impossible, and
21 subsequently, not effectuating the condition precedent to the 90 day period [in McEwen’s
22 contract].” (Id.)

23 In their affidavits supporting Mastrangelo’s motion for summary judgment, both
24 Pritchett and Ulbright aver that ACC had received information that a bank guarantee was
25 obtained, but ACC subsequently learned the documentation was fraudulent and there was
26 no guarantee. (Def.’s MSJ, Exs. B, C.) Pritchett and Ulbright state that ACC made

1 demands on Hurst, Carillo, and Arneson for the funds, but the money was not returned.
2 (Def.'s MSJ, Exs. B, C.)

3 According to Murphy, he called Ulbright on December 15, 2008, to follow up,
4 and Ulbright informed him that they had received the funds back and the matter was
5 resolved. (Pl.'s Opp'n, Ex. 13.) In late 2008, Carriera ran into Mastrangelo at a local
6 grocery store and asked how the project was going, to which Mastrangelo replied that things
7 had slowed down over the holidays but that McEwen's money would be arriving any day.
8 (Pl.'s Opp'n, Ex. 1.)

9 In the meantime, Mastrangelo continued doing due diligence on the Tomco
10 Project. (Def.'s MSJ, Exs. B, C.) Mastrangelo expressed concerns regarding the company
11 based on some missing heavy equipment and a lack of proper financial documentation.
12 (Def.'s MSJ, Exs. B, C, E.) ACC decided not to fund the Tomco Project in early February
13 2009. (Def.'s MSJ, Exs. B, C, D at 106.) Around that same time, Pritchett and Ulbright
14 informed McEwen about the decision not to fund the Tomco Project. (Def.'s MSJ, Exs. B,
15 C, D at 106, G.) The letter to Tomco advised that the reason ACC would not fund the
16 project was due to "[r]ecent actions by members of management of The Tomco
17 Corporation." (Def.'s MSJ, Ex. G.)

18 According to Pritchett and Ulbright, McEwen agreed to keep her money with
19 ACC "in the hope of getting a return based on other ACC projects being financed." (Def.'s
20 MSJ, Exs. B, C.) According to McEwen, she went to ACC's offices and demanded ACC
21 return her money. (Def.'s MSJ, Ex. D at 106; Pl.'s Opp'n, Ex. 6.) McEwen avers that
22 Ulbright told her that her money was tied up in a bank guarantee, but that she would get all
23 the money promised to her plus interest soon. (Pl.'s Opp'n, Ex. 6.) McEwen also avers that
24 Pritchett and Ulbright on several occasions personally guaranteed she would get her money
25 back. (Pl.'s Opp'n, Ex. 34.)

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1 A printout appears to show that Santander Bank issued a 100 million euro bank
2 guarantee on January 22, 2009 in favor of Halbau and ACC. (Pl.'s Opp'n, Ex. 20.)
3 McEwen avers that in March 2009, Mastrangelo told her that ACC had eight bank
4 guarantees each worth \$100 million, that her money would be coming soon, that when the
5 money came in they would fly to Mexico and stay at his condo to celebrate, that
6 Mastrangelo's wife looked over the paperwork and it looked good, and that Mastrangelo's
7 lawyers had traced the money and McEwen would be getting her money back. (Def.'s MSJ,
8 Ex. D at 35, 55; Pl.'s Opp'n, Ex. 6.) Mastrangelo denies that he ever told McEwen that her
9 contribution to ACC generated eight bank guarantees and she therefore would profit.
10 (Def.'s MSJ, Ex. E.) Mastrangelo admits he believed that ACC had obtained a bank
11 guarantee until early November 2009, when Pritchett and Ulbright discovered that the
12 documentation Carillo sent them was fraudulent. (Def.'s MSJ, Ex. E.)

13 McEwen sent several emails to the email account "loanfinder1@hotmail.com,"
14 which McEwen understood was an email account accessed by Pritchett, Ulbright, and
15 Mastrangelo. (Def.'s MSJ, Ex. D at 97; Pl.'s Opp'n, Ex. 6.) On June 29, McEwen sent an
16 email to Pritchett at the loanfinder email address asking if ACC had received her money.
17 (Pl.'s Opp'n, Ex. 34.) On July 9, McEwen sent an email to the loanfinder email address
18 directed to Pritchett, Ulbright, and Mastrangelo. (Pl.'s Opp'n, Ex. 34.) McEwen stated that
19 she had talked to Pritchett the week before asking about when she would receive her
20 money, and Pritchett told her it would be a few days. (Id.) McEwen waited a few days and
21 then spoke to Ulbright, who informed her she would receive her money that week. (Id.) As
22 of July 9, she still had not received her funds. (Id.) Plaintiff demanded return of her funds.
23 (Id.) That same day, McEwen received an email from "Accelerated Commercial
24 Consultants" promising her that "[w]e fully intend to make good on our agreement." (Pl.'s
25 Opp'n, Exs. 6, 34.)

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1 On July 14, 2009, ACC sent McEwen a letter signed by Pritchett, Ulbright, and
2 Mastrangelo which included a \$3,000 interest payment. (Def.'s MSJ, Ex. D at 98, I.) The
3 July 14 letter stated that although ACC had experienced a delay, they were "pleased to
4 inform you that the problem we experienced that caused this delay has been resolved."
5 (Def.'s MSJ, Ex. I.) The letter further promised that McEwen would be receiving a check
6 for the principal amount, and "[w]ithin a reasonably short time after receiving a check for
7 your principle amount you will receive your final check for the balance owed you as
8 prescribed by your agreement." (Id.) McEwen cashed the check, but disputed the amount
9 of interest. (Pl.'s Opp'n, Ex. 34.) On July 19, McEwen received an email from the
10 loanfinder email address signed by "ACC" stating that "[e]verything is on track and moving
11 forward as anticipated." (Pl.'s Opp'n, Ex. 34.)

12 On September 1, 3, and 9, 2009, McEwen sent emails to the loanfinder email
13 address demanding her money. (Pl.'s Opp'n, Ex. 34.) At some point in September,
14 McEwen apparently received ACC documents from a former ACC employee, Karen
15 Larson. (Def.'s Reply, Ex. E.) When McEwen demanded an interest check for August,
16 Ulbright responded by stating that McEwen was in possession of stolen goods, which is a
17 crime, and that if she wanted her check, she could come to the office to drop off the stolen
18 materials and pick up her check. (Pl.'s Opp'n, Ex. 34.) McEwen responded by denying she
19 had stolen goods, and demanding payment of all her funds by the end of September. (Id.)

20 Mastrangelo denies he sent or approved any emails to McEwen. (Def.'s MSJ,
21 Ex. E.) Mastrangelo admits he signed the July 14, 2009 letter. (Def.'s MSJ, Ex. E.)
22 However, Mastrangelo denies he told McEwen the transaction would be fully funded, or
23 that she would get her money on a specific date. (Def.'s MSJ, Ex. E.) Mastrangelo denies
24 he ever made any statement to McEwen to persuade her to invest with ACC or that he ever
25 made a statement to her which he knew or believed to be false. (Def.'s MSJ, Ex. E.)
26 Mastrangelo further denies that he ever accessed, possessed, or controlled any funds

1 deposited by McEwen. (Def.'s MSJ, Ex. E.)

2 McEwen was not the only person who sent money to ACC and claims to have not
3 received what was promised. Non-party James Portese ("Portese") avers that he met
4 Ulbright, Pritchett, and Mastrangelo, all of whom Portese characterizes as ACC partners, in
5 September 2008. (Pl.'s Opp'n, Ex. 37.) Portese spoke with the three about investing in
6 ACC. (Id.) On October 23, 2008, Portese sent ACC \$100,000. (Pl.'s Opp'n, Exs. 8, 37.)
7 Portese avers he personally handed the \$100,000 bank draft to Mastrangelo. (Pl.'s Opp'n,
8 Ex. 37.) According to Portese, Mastrangelo personally guaranteed Portese would be paid
9 back. (Id.) Portese started to become suspicious when he was not repaid and was met with
10 various excuses. (Id.) In August 2009, Portese met with Ulbright, Pritchett, and
11 Mastrangelo in ACC's offices, at which point Portese advised ACC that if he did not get his
12 \$100,000 back, he would report ACC to the Attorney General's Office. (Id.) About an
13 hour after Portese left ACC's offices, Ulbright called and told him to come back and pick
14 up a check for \$100,000. (Id.) Portese returned, picked up his check, and signed an
15 agreement with ACC that he would not discredit them or voluntarily testify against them.
16 (Id.)

17 Similarly, Bradford Trotter ("Trotter"), through his company JBL Holdings, LLC
18 ("JBL"), met with Ulbright, Pritchett, and Mastrangelo in May 2009. (Pl.'s Opp'n, Ex. 30.)
19 According to Trotter, all three represented themselves as ACC's principals. (Id.) Trotter
20 avers that the three told him they would issue a \$100 million bank guarantee from one of
21 their bank accounts at a top 25 bank outside the United States. (Id.) In exchange, Trotter
22 was to give ACC a \$1.5 million fee. (Id.) The three also told Trotter the \$1.5 million
23 would be held in an attorney trust account until the bank instrument successfully was
24 delivered to JBL's bank account. (Id.) In May 2009, JBL sent \$1.5 million to an attorney
25 trust account in Pennsylvania as designated by ACC. (Id.) Ulbright confirmed receipt of
26 the funds. (Id.)

1 On June 10, 2009, the Pennsylvania attorney wrote to Ulbright indicating that his
2 efforts to wire the money to the accounts designated by Ulbright were unsuccessful, and the
3 attorney therefore was returning the funds via endorsed check to Ulbright. (Pl.'s Opp'n, Ex.
4 31.) On June 17, ACC's checking account with Citibank showed a \$900,000 deposit. (Pl.'s
5 Opp'n, Ex. 32.) ACC's savings account with Citibank showed a \$300,000 deposit on that
6 same day, a \$295,000 deposit on June 22, and a \$5,000 deposit on June 24. (Id.) The
7 Citibank account records show an \$800,000 withdrawal from the checking account on June
8 17. (Id.) Over the next twelve days, the remainder of the funds in the checking account
9 were depleted except for approximately \$2,500. (Id.) The savings account in early July had
10 a balance of over \$500,000. (Id.) All but approximately \$5,000 of those funds were
11 withdrawn in the month of July. (Id.) ACC also had an account at SunWest Bank, from
12 which Mastrangelo received \$30,000 on July 10, 2009, as "payroll." (Pl.'s Opp'n, Ex. 33.)

13 By June 2009, Trotter learned that ACC had possession of the \$1.5 million even
14 though JBL did not receive the bank guarantee. (Id.) Trotter thereafter obtained counsel
15 and made demand on ACC. (Id.) As of February 2010, ACC and its principals have not
16 returned the funds. (Id.)

17 In a declaration filed in support of his reply, Mastrangelo avers that with respect
18 to JBL, ACC "confirmed that the instrument from the bank was verified and at that time
19 took a commission for their work. I along with the other officers of ACC then received a
20 commission for our work in facilitating the bank instrument on July 10, 2010." (Def.'s
21 Reply, Ex. A.) Mastrangelo does not provide any documentation regarding the verification
22 of the bank instrument. Mastrangelo does not address Portese's allegations.

23 Plaintiff McEwen filed suit in this Court on November 12, 2009, against ACC,
24 Pritchett, Ulbright, and Mastrangelo. (Compl. (Doc. #1).) The claims against Mastrangelo
25 are for unjust enrichment (count five), monies owed (count six), fraudulent
26 misrepresentation (count seven), negligent misrepresentation (count eight), conversion

1 (count nine), negligence per se (count ten), negligence (count eleven), constructive fraud
2 (count twelve), breach of fiduciary duty (count fourteen), RICO (count fifteen), RICO
3 conspiracy (count sixteen), racketeering (count seventeen), racketeering conspiracy (count
4 eighteen), civil conspiracy (count nineteen), and for an accounting (count twenty-two).

5 Two weeks after McEwen filed suit, ACC commenced an action in Nevada state
6 court against Carillo and Sagrado Oro. (Pl.'s Opp'n, Ex. 35.) That complaint references
7 the \$700,000 and contends that Carillo and Sagrado Oro were under a fiduciary duty not to
8 use the funds for their own purposes, but they breached those duties by misappropriating
9 ACC's funds. (Id.) The case remains pending in Nevada state court.

10 On September 15, 2010, Ulbright sent an unsigned letter to the email address
11 "info@acceleratedcommercial.us." (Pl.'s Opp'n, Ex. 41.) The letter has a signature block
12 for McEwen and states that McEwen—

13 would like to take this opportunity to inform those that may question
14 the honesty and integrity of Accelerated Commercial Consultants and
15 it's [sic] Principals Terry Pritchett and Frank Ulbright that the things
16 that have been posted to the internet defaming the aforementioned
17 [sic] are not my doing and I am trying to assist Accelerated and it's
18 [sic] Principals to have these things removed. I have been made aware
19 through the content of depositions that were taken that the things that
20 were alleged are false. Accelerated and it's [sic] principals did not
misappropriate any funds. I was lied to by a disgrunteled [sic] former
contract employee of Accelerated. Documents were stolen fromn [sic]
their office and selectively pieced together to create the picture and
impression that misconduct had existed on Accelerated's part and that
is not true. We (Accelerated and myself) with the assdistanace [sic] of
my attorney are in the process of having the judgement rendered
against Accelerated and it's [sic] Principals vacated.

21 (Id.) Ulbright stated in the accompanying email that "[i]f we can get this or a version close
22 to this that will establish that we are not thieves we can earn and get things and people made
23 whole again." (Id.) No evidence suggests McEwen ever signed or approved such a
24 statement.

25 Defendant Mastrangelo now moves for summary judgment on each of the claims
26 against him on various grounds. Plaintiff opposes the motion, except for the negligence-

1 based claims, which Plaintiff concedes are barred by the economic loss doctrine.

2 **II. DISCUSSION**

3 Summary judgment is appropriate “if the pleadings, the discovery and disclosure
4 materials on file, and any affidavits show that there is no genuine issue as to any material
5 fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).
6 A fact is “material” if it might affect the outcome of a suit, as determined by the governing
7 substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is
8 “genuine” if sufficient evidence exists such that a reasonable fact finder could find for the
9 non-moving party. Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir.
10 2002). Initially, the moving party bears the burden of proving there is no genuine issue of
11 material fact. Leisek v. Brightwood Corp., 278 F.3d 895, 898 (9th Cir. 2002). After the
12 moving party meets its burden, the burden shifts to the non-moving party to produce
13 evidence that a genuine issue of material fact remains for trial. Id. The Court views all
14 evidence in the light most favorable to the non-moving party. Id.

15 **A. RICO - Counts Fifteen Through Eighteen**

16 Mastrangelo argues he is entitled to summary judgment on these claims because
17 he did not commit any criminal acts and was not part of a criminal enterprise. McEwen
18 responds that Mastrangelo, Pritchett, and Ulbright were engaged in an enterprise in fact,
19 and he and his cohorts engaged in mail and wire fraud. Specifically, McEwen argues that
20 Defendants, including Mastrangelo, sent her emails and a letter by mail assuring her that
21 she would receive her money soon, all while cleaning out their bank accounts and making
22 no effort to repay her or Trotter, and paying Portese only upon his threat to go to the
23 authorities. McEwen notes that once she started demanding her money, Defendants made
24 her interest payments to appease her until she filed suit, at which time the interest payments
25 stopped.

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1 McEwen further argues that Defendants have engaged in a pattern of racketeering
2 activity, as demonstrated by the similar conduct with Portese and Trotter, and Ulbright's
3 email in September 2010 demonstrates a threat of continuing behavior. McEwen contends
4 that despite his protestations, Mastrangelo personally participated in the fraud by telling her
5 that if she invested to help obtain the bank guarantee they would all be rich, and by making
6 false assurances to her later that her money would be coming soon to make her refrain from
7 pursuing legal remedies against Defendants.

8 To prevail on a federal civil RICO claim, a plaintiff must demonstrate "(1)
9 conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as
10 'predicate acts') (5) causing injury to plaintiff's 'business or property.'" Living Designs,
11 Inc. v. E.I. Dupont de Nemours & Co., 431 F.3d 353, 361 (9th Cir. 2005) (quotation
12 omitted). Pursuant to § 1962(d), it is unlawful to conspire to commit a violation of
13 § 1962(c).¹

14 To satisfy the first element, a defendant "must participate in the operation or
15 management of the enterprise itself." Reves v. Ernst & Young, 507 U.S. 170, 185 (1993).
16 Conduct "requires an element of direction." Walter v. Drayson, 538 F.3d 1244, 1247 (9th
17 Cir. 2008) (quotation omitted). The defendant need not be "upper management" to conduct
18 the enterprise's affairs, as an enterprise is "'operated' not just by upper management but
19 also by lower rung participants in the enterprise who are under the direction of upper
20 management." Reves, 507 U.S. at 184. However, simply providing services to the
21 enterprise without an element of direction is insufficient. Walter, 538 F.3d at 1249.

22 An enterprise "includes any individual, partnership, corporation, association, or
23 other legal entity, and any union or group of individuals associated in fact although not a
24

25 ¹ Nevada RICO claims are similar, but different conduct may constitute racketeering
26 activity under Nevada state law.

1 legal entity.” 18 U.S.C. § 1961(4). A plaintiff pleads an enterprise through allegations of
2 “an ongoing organization, formal or informal,” and by allegations that “the various
3 associates function as a continuing unit.” Odom v. Microsoft Corp., 486 F.3d 541, 549 (9th
4 Cir. 2007) (en banc) (quotation omitted). An organization is ongoing if it “is a vehicle for
5 the commission of two or more predicate crimes.” Id. at 552 (quotation omitted).
6 Allegations that the organization existed over a two-year timespan suffice to allege a
7 continuing unit. Id. Where the plaintiff alleges an associated-in-fact enterprise, the
8 plaintiff need not allege “any particular organizational structure, separate or otherwise.” Id.
9 at 551.

10 A plaintiff establishes a pattern of racketeering activity by showing the
11 participants in the enterprise committed at least two acts of racketeering. Id. at 552; 18
12 U.S.C. § 1961(5). To prove a pattern of racketeering activity, the plaintiff must show “that
13 the racketeering predicates are related, and that they amount to or pose a threat of continued
14 criminal activity.” H.J. Inc. v. N.W. Bell Tel. Co., 492 U.S. 229, 239 (1989). Predicate acts
15 are related if they have similar “purposes, results, participants, victims, or methods of
16 commission, or otherwise are interrelated by distinguishing characteristics and are not
17 isolated events.” Id. at 240 (quotation omitted).

18 As to continuity, a plaintiff must show either a closed period of repeated conduct,
19 or past conduct that by its nature projects into the future with a threat of repetition. Id. at
20 241. “Continuity does not require a showing that the defendants engaged in more than one
21 ‘scheme’ or ‘criminal episode.’” Medallion Television Enters., Inc. v. SelecTV of Cal.,
22 Inc., 833 F.2d 1360, 1363 (9th Cir. 1987). However, the circumstances in any particular
23 case may demonstrate the predicate acts do not amount to a threat of continuing activity. Id.

24 Racketeering activity includes “any act or threat involving murder, kidnapping,
25 gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a
26 controlled substance or listed chemical . . . which is chargeable under State law and

1 punishable by imprisonment for more than one year.” 18 U.S.C. § 1961(1)(A).

2 Racketeering activity also includes a variety of specified federal crimes, including mail and
3 wire fraud. Id. § 1961(1)(B). To state the elements of wire or mail fraud, the plaintiff must
4 allege (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the
5 mails or wires in furtherance of the scheme; and (3) the defendants acted with the specific
6 intent to deceive or defraud. Miller v. Yokohama Tire Corp., 358 F.3d 616, 620 (9th Cir.
7 2004); United States v. Manion, 339 F.3d 1153, 1156 (9th Cir. 2003). The mails or wires
8 are used in furtherance of a scheme even if use of the mails or wires is not an “essential
9 element” of the fraudulent the scheme, so long as it is “a step in the plot.” United States v.
10 Shipsey, 363 F.3d 962, 971 (9th Cir. 2004) (quotation omitted).

11 Finally, to establish causation, the plaintiff must allege she was injured “by
12 reason of” the defendant’s alleged racketeering activity. Living Designs, Inc., 431 F.3d at
13 362-63. The plaintiff therefore must allege the defendant’s conduct proximately caused her
14 injury. Poulos v. Caesars World, Inc., 379 F.3d 654, 666 (9th Cir. 2004).

15 Viewing the evidence in the light most favorable to Plaintiff, McEwen presents
16 evidence raising an issue of fact as to each element. First, she raises an issue of fact as to
17 Mastrangelo conducting an enterprise. She, Portese, and Trotter aver that Mastrangelo was
18 presented to them as an ACC partner. Mastrangelo had signature authority on the bank
19 account; personally guaranteed Portese that Portese would get his money back; received the
20 check from Portese; met with Portese, McEwen, and Trotter to discuss the various
21 investments; and assured McEwen she would get her money back at the same time he,
22 Ulbright, and Pritchett gave McEwen an interest payment. Mastrangelo does not deny
23 extensive involvement in ACC’s activities even before he was formally named as ACC’s
24 treasurer.

25 The enterprise is either ACC itself or an association in fact between Ulbright,
26 Pritchett, and Mastrangelo, which was an ongoing organization through 2008 and 2009. It

1 is irrelevant when Mastrangelo officially became an ACC officer or director because an
2 association in fact will suffice. Even if Mastrangelo had to be an ACC officer or director,
3 viewing the evidence in the light most favorable to McEwen, Mastrangelo was a partner
4 with Ulbright and Pritchett, as represented to McEwen, Portese, and Trotter, even before
5 Mastrangelo officially became ACC's Treasurer.

6 A genuine issue of material fact exists as to whether Defendants committed two
7 acts of racketeering activity in the form of mail and wire fraud. Viewing the evidence in the
8 light most favorable to Plaintiff, Defendants engaged in three similar schemes against
9 McEwen, Portese, and Trotter. Ulbright and Pritchett promised McEwen a risk-free
10 investment, personally guaranteed she would get her money back, and promised she would
11 triple her investment within 90 days. According to Portese, Mastrangelo made similar
12 representations to him, including a personal guarantee that Portese would get his money
13 back. After McEwen and Portese invested, Defendants offered varying excuses as to why
14 the funds were not available, and continuously put McEwen and Portese off as to when their
15 funds would be available. At the same time Defendants were telling McEwen via email and
16 the July 2009 letter that her money would arrive any day, they were draining ACC's
17 accounts of hundreds of thousands of dollars within a matter of weeks. Mastrangelo admits
18 signing the July 2009 letter in which he, Ulbright, and Pritchett advised McEwen that the
19 problem causing the delay had been resolved and she would receive her money shortly.
20 Nothing in the record supports a reasonable belief on Defendants' part that either of these
21 statements were true. To this day, Plaintiff has not received her funds.

22 Portese received his money within an hour after threatening to report Defendants
23 to law enforcement. A reasonable jury could find that Defendants made promises to
24 McEwen via email and mail and sent her an interest payment in an effort to appease her and
25 keep her from similarly contacting authorities or seeking other legal remedies. Thus, use of
26 the mails and wires was part of the scheme to defraud.

1 Defendants also used the bank guarantee to induce Trotter to deposit \$1.5 million
2 in an attorney trust account which, like the attorney trust account in McEwen's and
3 Portese's situations, released the funds in violation of the agreed conditions. There is no
4 evidence that Defendants responded to Trotter's demands for repayment, and instead
5 Defendants drained ACC's accounts of Trotter's \$1.5 million within twelve days. Although
6 Mastrangelo contends the Trotter deal was successful, Trotter states otherwise under oath.
7 The Court must view the facts in the light most favorable to Plaintiff, and cannot resolve a
8 credibility conflict between Mastrangelo and Trotter at the summary judgment stage. A
9 reasonable jury could believe Trotter's version of events, particularly where no
10 documentary evidence in the record supports Mastrangelo's version.

11 Defendants' explanation that Carillo spirited the funds away is undermined by
12 their own statements on the issue. Although Defendants now contend they discovered
13 Carillo's conduct in November 2009, Mastrangelo made no mention of that fact or defense
14 in his opposition to McEwen's motion for partial summary judgment in April 2010 nor in
15 his supporting affidavit. In an April 2010 filing, Ulbright and Pritchett contended that
16 Murphy transferred the funds to Carillo, however viewing the documentary evidence in the
17 lights most favorable to Plaintiff, the documents show that Ulbright knew in November
18 2008 that Murphy transferred the funds to Arneson, and Arneson had released the funds
19 without authorization. Further, Mastrangelo's summary judgment motion states that
20 Defendants were paying McEwen interest payments as they tried to recover the money from
21 Carillo, but the interest payments were in July and August 2009, and Mastrangelo claims
22 Defendants did not uncover Carillo's fraud until November 2009. Given Defendants'
23 various statements on the issue, a reasonable jury could question the veracity of these
24 explanations.

25 Moreover, Mastrangelo has presented no evidence as to what basis Defendants
26 had for telling McEwen and Portese that their funds would arrive soon. The absence of any

1 such evidence could lead a reasonable juror to conclude that Defendants, including
2 Mastrangelo, knew all along that the funds would not be repaid, and they were simply
3 putting off McEwen and Portese while they either spent the money or sent it to a location
4 where McEwen, Portese, and Trotter could not locate it.

5 McEwen thus has presented evidence that Defendants had a scheme to defraud,
6 and that they used email and the mail as an essential step in the plot to attempt to appease
7 and put off McEwen when she started asking for her money. Given the similar conduct
8 with respect to Portese and Trotter, and Defendants' efforts to keep Portese quiet by making
9 him sign a confidentiality agreement to get his money back, McEwen also has presented
10 evidence raising an issue of fact that the activity was continuous over a span of nearly a
11 year. Moreover, Mastrangelo does not address the state law predicate acts McEwen asserts
12 in support of her Nevada RICO claims, including conversion and fraud. Genuine issues of
13 material fact remain as to whether Mastrangelo was involved in a scheme to defraud
14 McEwen and others, and thus multiple acts of fraud would support the state law RICO
15 claims as well. The Court will deny Mastrangelo's motion as to all state and federal RICO
16 counts.

17 **B. Civil Conspiracy - Count Nineteen**

18 Mastrangelo argues there is no evidence he formed a conspiratorial objective
19 with others to defraud McEwen, and he denies he was involved in inducing McEwen to
20 invest with ACC. McEwen responds that the evidence shows Mastrangelo, Pritchett, and
21 Ulbright conspired to induce McEwen to invest her money to obtain a purported \$100
22 million bank guarantee to fund Tomco, that Mastrangelo was a key player as he was
23 involved in many discussions on the topic and told McEwen if she invested to help obtain
24 the bank guarantee they would all be rich, and Mastrangelo assured Carriera everything was
25 on track. McEwen further contends the defense that Carillo stole the money is a sham
26 defense, as demonstrated by the fact that Defendants never mentioned this issue until an

1 April 2010 affidavit by Ulbright, Defendants have changed stories on when they first
2 discovered Carillo's alleged theft and who was involved with Carillo, no document ever has
3 been produced showing Carillo took the money, and Defendants did not pursue legal action
4 against Carillo until two weeks after McEwen filed her suit against Defendants.

5 As RICO is essentially a conspiracy to commit crimes, the same evidence raises a
6 genuine issue of material fact as to conspiracy. As the Court previously set forth, viewing
7 the facts in the light most favorable to Plaintiff, a reasonable jury could find that
8 Mastrangelo, Ulbright, and Pritchett conspired to defraud McEwen. The Court will deny
9 Mastrangelo's motion on this claim.

10 **C. Fraud - Counts Seven**

11 Mastrangelo argues there is no evidence he made any specific misrepresentation
12 to McEwen that induced her to invest money with ACC. Mastrangelo contends the only
13 statement McEwen attributes to him prior to her investing with ACC is that they would all
14 be rich. Mastrangelo argues this is mere puffery and cannot support a fraud claim.
15 Mastrangelo further argues that the statements McEwen attributes to him after she invested,
16 such as that ACC had secured bank guarantees and they would fly to his condo to celebrate,
17 are not actionable because McEwen has no evidence Mastrangelo knew the statements were
18 not true when he made them. Mastrangelo also argues there can be no reliance on these
19 statements because McEwen already had invested her money by that point. McEwen
20 responds that she testified Mastrangelo made the "we'll all be rich" comment before she
21 invested, and that it was specific enough to support a fraud claim because it was predicated
22 on her investing in the bank guarantee. McEwen also argues that Mastrangelo made
23 specific representations to her that her money would be coming soon to induce her to refrain
24 from seeking legal remedies against Defendants, and this suffices to support a fraud claim.

25 To establish a fraud claim, a plaintiff must show by clear and convincing
26 evidence: (1) the defendant made a false representation; (2) knowing or believing that the

1 representation is false or having an insufficient basis for making the representation; (3) the
2 defendant intended to induce the plaintiff “to act or to refrain from acting in reliance upon
3 the misrepresentation;” (4) the plaintiff justifiably relied on the misrepresentation; and (5)
4 the plaintiff suffered resulting damage. Albert H. Wohlers & Co. v. Bartgis, 969 P.2d 949,
5 957-58 (Nev. 1998).

6 Viewing the evidence in the light most favorable to Plaintiff, Mastrangelo’s
7 statement to McEwen prior to her investing with ACC is not mere puffery or too
8 non-specific to support a fraud claim. McEwen testified that Mastrangelo stated to her that
9 if she invested her money so that ACC could obtain a \$100 million bank guarantee to fund
10 the Tomco Project, they would all be rich. If, at the time Mastrangelo made that comment,
11 he knew Defendants were not going to use McEwen’s investment to get a bank guarantee
12 and instead were going to keep McEwen’s funds for themselves, it is actionable fraud. A
13 reasonable jury could so conclude. As discussed more fully with respect to the RICO
14 counts, a reasonable jury could find that Defendants were engaged in a fraudulent scheme
15 to induce McEwen and others to give large quantities of money to ACC with no intent of
16 using it for the specified purpose, and with no intent to repay the funds plus interest as
17 promised.

18 Even if Mastrangelo’s comment to McEwen prior to her investment is not
19 actionable fraud, Mastrangelo admittedly represented to McEwen in a July 2009 letter that
20 the problem causing the delay in receiving McEwen’s funds was resolved and McEwen
21 would be getting her money soon. A reasonable jury could conclude this was false and
22 Mastrangelo knew it was false. Nothing in the record provides a basis for Mastrangelo’s
23 statements that the problem had been resolved or that McEwen would be receiving her
24 funds soon. At the time Mastrangelo made this representation, ACC had just taken
25 Trotter’s \$1.5 million and liquidated it. Despite having enough funds to pay McEwen at
26 that time, ACC put her off with more promises while Defendants drained the bank accounts.

1 Around this same time, ACC paid off Portese when he threatened to report ACC to the
2 authorities. Further, Mastrangelo, Ulbright, and Pritchett have offered varying explanations
3 of where the money has gone and when they discovered the alleged fraud by Carillo. A
4 reasonable jury could find that McEwen relied on Mastrangelo's promise of future payment
5 by refraining from taking further steps to get her money back, or refraining from reporting
6 Defendants to any law enforcement authorities.

7 Further, if Mastrangelo was involved in a conspiracy with Pritchett and Ulbright,
8 he is responsible for his co-conspirators' fraudulent acts taken in furtherance of the
9 conspiracy. As discussed above, there is evidence from which a reasonable jury could
10 conclude Mastrangelo was a participant in a fraudulent scheme with Ulbright and Pritchett.
11 The Court therefore will deny Mastrangelo's motion as to the fraud claim.

12 **D. Constructive Fraud and Breach of Fiduciary Duty - Counts Twelve and**
13 **Fourteen**

14 Constructive fraud "is the breach of some legal or equitable duty which,
15 irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive
16 others or to violate confidence." Long v. Towne, 639 P.2d 528, 529-30 (Nev. 1982).
17 "Constructive fraud is characterized by a breach of duty arising out of a fiduciary or
18 confidential relationship." Id. Such a relationship exists "when one reposes a special
19 confidence in another so that the latter, in equity and good conscience, is bound to act in
20 good faith and with due regard to the interests of the one reposing the confidence." Id. The
21 Nevada Supreme Court has held that fiduciary duties arise as a matter of law, such as
22 insurers and insured, attorney and client, between spouses or fiancés, and corporate officers
23 or directors and the corporation. Giles v. General Motors Acceptance Corp., 494 F.3d 865,
24 881 (9th Cir. 2007). Additionally, "[i]nvestment advisors have been held to occupy a
25 confidential relation toward those advised." Randono v. Turk, 466 P.2d 218, 222 (Nev.
26 1970).

1 Viewing the facts in the light most favorable to Plaintiff, McEwen fails to raise a
2 genuine issue of fact that a fiduciary or confidential relationship existed between herself
3 and Mastrangelo. She did not have a friendship or other close relationship with
4 Mastrangelo. She met him not long before she invested with ACC. She does not present
5 evidence of a close relationship with him, and does not provide any basis for a fiduciary
6 relationship other than that she invested funds with ACC; that Mastrangelo, Ulbright, and
7 Pritchett were sophisticated businessmen who regaled her with tales of their financial
8 successes and glamorous lifestyle; and Pritchett was her neighbor with whom she
9 socialized. Merely being a more sophisticated business person who regales a less
10 sophisticated investor with tales of success and a lavish lifestyle during a few social
11 gatherings does not create a confidential relationship. Even if the mere investment of funds
12 could create a fiduciary duty, McEwen entrusted her funds to ACC pursuant to a contract
13 signed by Ulbright and Pritchett. McEwen presents no authority that this would create a
14 fiduciary duty running from Mastrangelo to McEwen. Although ACC offered McEwen an
15 investment opportunity, neither ACC nor Mastrangelo were her investment advisor. The
16 Court therefore will grant Mastrangelo summary judgment on the constructive fraud and
17 breach of fiduciary duty claims.

18 **E. Unjust Enrichment - Count Five**

19 Mastrangelo argues he is entitled to summary judgment on this claim because
20 McEwen cannot show he obtained a benefit from McEwen's contribution to ACC.
21 Mastrangelo argues the evidence shows McEwen wired the money to ACC, a few days later
22 it was wired to Murphy & Vickers, and Mastrangelo never controlled it or benefitted from
23 it. McEwen responds that Mastrangelo exercised dominion and control over her funds
24 because he had signatory authority over it, and he benefitted from it because he used it to to
25 continue the scheme, obtain money from Trotter, and then pay himself \$30,000.

26 ///

1 Under Nevada law, unjust enrichment is “the unjust retention . . . of money or
2 property of another against the fundamental principles of justice or equity and good
3 conscience.” Asphalt Prods. Corp. v. All Star Ready Mix, Inc., 898 P.2d 699, 701 (Nev.
4 1995) (quotations omitted). To establish an unjust enrichment claim, the plaintiff must
5 show “a benefit conferred on the defendant by the plaintiff, appreciation by the defendant of
6 such benefit, and acceptance and retention by the defendant of such benefit.” Topaz Mut.
7 Co., Inc. v. Marsh, 839 P.2d 606, 613 (Nev. 1992). An indirect benefit will suffice. Id.

8 Viewing the evidence in the light most favorable to Plaintiff, a genuine issue of
9 material fact remains on this claim. McEwen conferred a benefit on Mastrangelo by
10 investing with ACC. As discussed above, genuine issues of fact remain as to whether
11 Mastrangelo conspired with Pritchett and Ulbright to defraud McEwen and others. A
12 reasonable inference from that evidence is that Mastrangelo ultimately received a portion of
13 McEwen’s funds. Moreover, Mastrangelo received an indirect benefit from McEwen’s
14 investment because he was able through ACC to continue soliciting investors, received \$1.5
15 million from JBL, and admittedly gave himself \$30,000 of these funds. McEwen has made
16 demand for return of her funds, and despite many promises of repayment by Mastrangelo,
17 Pritchett, and Ulbright, has not been repaid. The Court will deny Mastrangelo’s motion as
18 to this claim.

19 **F. Monies Owed - Count Six**

20 Mastrangelo argues that he did not sign any agreement with McEwen and thus
21 McEwen cannot recover against him on any contract-based claim. McEwen responds that
22 there is no requirement for a contract to support this claim. Rather, McEwen argues,
23 Mastrangelo used her money contrary to her agreement with ACC and has failed to return it.

24 Under Nevada law, a claim “for money had and received can be maintained
25 whenever one man has received or obtained the possession of the money of another, which
26 he ought in equity and good conscience to pay over.” Kondas v. Washoe County Bank,

1 271 P. 465, 466 (Nev. 1928). For such a claim, privity need not exist between the parties,
2 nor must there be “any promise to pay, other than that which results or is implied from one
3 man’s having another’s money, which he has no right conscientiously to retain.” Id.
4 “When the fact is proved that he has the money, if he cannot show a legal or equitable
5 ground for retaining it the law creates the privity and the promise.” Id.

6 This claim is similar to an unjust enrichment claim. For the same reasons just
7 discussed, the Court will deny Mastrangelo’s motion as to this claim.

8 **G. Conversion - Count Nine**

9 Mastrangelo argues McEwen’s conversion claim fails because she cannot show
10 he exercised dominion or control over her money. McEwen responds that Mastrangelo
11 exercised dominion and control over her funds because he had signatory authority over the
12 account into which her funds were placed. She also contends that Defendants possessed her
13 funds and refused to return them upon her demand, and that constitutes conversion.

14 As with the unjust enrichment claim, because genuine issues of material fact
15 remain as to whether Mastrangelo was a participant in an overall scheme to defraud,
16 genuine issues of fact remain as to this claim as well. Because a reasonable jury could find
17 scheme to defraud of which Mastrangelo was a participant, a reasonable jury could find
18 Mastrangelo had dominion and control over McEwen’s funds, either directly or through the
19 acts of his co-conspirators. The Court therefore will deny Mastrangelo’s motion as to this
20 claim.


21 **III. CONCLUSION**

22 IT IS THEREFORE ORDERED that Defendant Mark Mastrangelo’s Motion for
23 Summary Judgment (Doc. #88) is hereby GRANTED in part and DENIED in part. The
24 motion is granted as to Plaintiffs’ negligence-based claims (counts eight, ten, and eleven),
25 constructive fraud claim (count twelve), and breach of fiduciary duty claim (count
26 fourteen). The motion is denied in all other respects.

1 IT IS FURTHER ORDERED that the parties shall file a proposed joint pretrial
2 order no later than March 4, 2011.

3 IT IS FURTHER ORDERED that this matter is referred to Magistrate Judge
4 Lawrence Leavitt for a settlement conference.

5
6 DATED: February 4, 2011

7
8 
9 PHILIP M. PRO
United States District Judge